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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANJANETTE CORENE DAVIDSON, Defendant and Appellant.	A152777 (Contra Costa County Super. Ct. No. 5-161208-4)

Following a jury trial at which the primary issue was mistaken identification, Anjanette Corene Davidson was convicted of residential burglary and an attempt to take or drive a vehicle without the owner's consent. (Pen. Code, §§ 459, 460, 664; Veh. Code, § 10851, subd. (a).) In an appeal from the judgment imposing four years in prison, she argues: (1) the pretrial identification procedures were unduly suggestive and tainted the in-court identification of appellant by two witnesses; (2) the evidence was insufficient to prove she aided and abetted an attempt to take or drive a vehicle without the owner's consent; (3) the jury was improperly instructed it could consider certainty as a factor affecting the credibility of eyewitness identification, and counsel provided ineffective assistance by failing to object to the instruction; and (4) a $300 restitution fine and $70 in fees were imposed by the court despite her inability to pay and should be vacated. We affirm.

I. BACKGROUND

Around noon on March 18, 2016, Francisco Torres drove by the Pleasant Hill home of his neighbor, Emelita Bueno. He noticed two women and a man talking while standing outside on the sidewalk. Torres described one of the women as heavy set with brown hair and the other as thinner, with pimples and wavy shoulder-length hair that was half-yellow wearing a pink blouse. The individuals stood next to a grey Toyota Camry and then walked toward the nearby Sunvalley Mall; at some point, the man sat inside the Camry. Torres wrote down the license plate number of the Camry.

Bueno drove home for lunch and as she approached her house, she observed that her Dodge Durango, which was parked in the driveway, was moving. She saw a man standing by the open driver's side door of the Durango with his right arm inside the truck. The man was shaking the truck, attempting to break the club that Bueno had used to lock the steering wheel. Without even thinking, Bueno pulled her car behind the Durango and stood about 12 feet away from the man. He looked "surprised," and called out to someone inside Bueno's house. A woman came out of the house and stood next to the man. Bueno described her as about five feet two inches or five feet three inches tall, "mestizo" or White, with shoulder-length curly hair that was died two different colors, wearing a pink top. They walked past Bueno toward the Sunvalley Mall, eventually splitting up. When they left, Bueno noticed that the club lock on her Durango had been bent or broken. Bueno went inside her house and found it a mess, with several items missing or misplaced. She called 911.

Officer Bias of the Pleasant Hill Police Department responded to the call at about 12:30 p.m. Bueno was "really upset and nervous" and provided a description of the suspects. Officer Bias then spoke to Torres, who described the Camry he had seen at Buenos's home earlier that day and provided the license plate number he had written down.

Later that same day, Officer Rouse of the Vallejo Police Department was running the license plates of vehicles parked in the Travel Inn Motel and he came across a Camry with the same plate as described by Torres. The car was unoccupied and was missing a

car stereo; it had been stolen from its owner. Officer Rouse located and contacted appellant and Keith Warren in the parking lot, but did not arrest them.

On March 27, 2016, after Officer Bias was informed of the recovery of the Camry, he met with Bueno at the police station and conducted a six-pack photographic lineup for each burglary suspect. One six-pack contained a photograph of appellant; the other contained a photograph of Keith Warren. After Officer Bias read Bueno the standard admonition,[1] Bueno identified the photograph of appellant as the woman who walked out of her house on March 18 and Warren as the man with his arm inside the Durango. The identification of appellant's photograph took about 5 seconds and Bueno indicated she was 100 percent sure. Officer Bias later met with Torres to show him the two photographic lineups. Torres identified appellant in about five seconds and indicated he was "almost positive" she was one of the two females he saw in front of Bueno's house. He did not identify Warren. At trial, Torres identified appellant in court and Bueno indicated appellant looked like the woman in her house but she was wearing makeup and her hair was down.

The defense was mistaken identity. Mitchell Eisen, Ph.D., testified as an expert in eyewitness identification. He testified that memory is "changeable" and there would always be gaps, as human minds are not cameras. As time moves forward, memories shift, and people have more time to be exposed to new information that may cause them to rethink an experience. Regarding six-pack line-ups, the pictures other than the suspect should be "viable choices" sharing the same characteristics based on the witness's description. It is advisable to use "double blind" controls in which the person administering the line-up does not know which picture belongs to the suspect, to avoid inadvertently signaling the desired response. It is also desirable to show the witness the photographs sequentially, or one at a time, so that the witness will not simply compare

[1] (1) "I'm going to show you a set of photographs. The person who committed this crime may or may not be shown." (2) "It's just as important to clear innocent persons as it is to identify those who are guilty." (3) "Individuals may not appear actually as they did. Appearances are subject to change." (4) "Regardless of the results, the investigation will continue."

the choices and select the person who looks most like the suspect. A witness's confidence can be bolstered by "hindsight bias," or by conduct occurring after an identification (such as the government's decision to prosecute) that endorses the identification. Ultimately, most people stick with their initial decision, whether it was mistaken or not.

II. DISCUSSION

A. *Photographic Identification Procedures*

Appellant contends the trial court violated her right to due process when it admitted evidence of the photographic lineups given to Bueno and Torres. She contends the lineups were unduly suggestive because (1) appellant was the only one of the six subjects who had shoulder length curly hair, similar to the witnesses' description of the suspect; (2) Officer Bias presented the photographs as a one-page six-pack, rather than showing the photographs sequentially to the two witnesses; (3) and Officer Bias knew the identity of the suspect when he presented the six-packs, making it more likely he did something to influence the witnesses. We disagree that evidence of the lineups should have been suppressed.

1. Procedural Background

Defense counsel objected to evidence of the six-pack identifications as unduly suggestive. A pretrial hearing was held under Evidence Code section 402 to evaluate the admissibility of the identifications, at which Officer Bias was the sole witness. He described the procedure used to compile the lineup, in which he searched the "Cal. Photo Identification Database" that allowed him to choose photos from Department of Motor Vehicle (DMV) records, and "click on a button that says similar" to search for photographs that matched the subject by characteristics such as age, gender, race, weight and hair color. Officer Bias noted that none of the women selected for the lineup was wearing a pink top such as that worn by the suspect, and he opined that more than one has "somewhat curly hair." Officer Bias opted to use a six-pack rather than a sequential show-up.

During each lineup, Officer Bias accompanied each witness into a room and completed an admonition. On Bueno's admonishment form, Officer Bias indicated, "Looks like #4 [appellant], the hair and the face. Recognize face 100%." On Torres's form, Officer Bias wrote, "5 seconds #4, same hair, 80% positive it is her. Walking with other woman suspect from victim[']s house."

The court preliminarily denied appellant's motion to suppress evidence of the lineups. It acknowledged that appellant's hair was "more distinctively curlier or crimped than it is on the others," but it did not believe it made her stand out in a way that was unduly suggestive. The court noted that hairstyles can change, and Bueno emphasized in the statement recorded on the form that it was the face of the woman in the photograph that she recognized "100%." The court indicated it would listen to the evidence at trial and revisit its ruling if necessary.

At the conclusion of the hearing, the court issued a subpoena for the Pleasant Hill Police Department's records custodian and subsequently reviewed a document entitled, "Policy No. 610 of the Pleasant Hill Police Department." After a brief hearing with the custodian outside the presence of the jury, the court concluded the "preferred" way of conducting lineups is by "sequential demonstration."

At trial, both Bueno and Torres identified appellant in court as the suspect. They also both indicated she was the only woman pictured with curly or wavy hair in the photographic lineup.

While the jury was deliberating, the court indicated to counsel that having heard all the evidence, the photographic lineup procedure employed by Officer Bias was not unduly suggestive and in any event, the in-court identifications were independent of the lineups and were not tainted by the photographic lineups. The court noted that both witnesses observed appellant during broad daylight, out in the middle of public view.

2. Discussion

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) It is the defendant's burden to demonstrate the existence of an unreliable identification procedure. (*Ibid.*) "We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943; *People v. Lucas* (2014) 60 Cal.4th 153, 235 (*Lucas*), disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.)

"A due process violation occurs only if the identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is much more distinguishable from the others in the lineup." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.)

" '[T]he law does not require a perfect lineup, only that it be a lineup that is a fair one, and that it not be impermissibly suggestive.' " (*Lucas*, *supra*, 60 Cal.4th at p. 236.) "[W]e have recognized that ' "[b]ecause human beings do not look exactly alike, differences are inevitable" ' and the primary concern ' "is whether anything caused

defendant to 'stand out' from the others in a way that would suggest the witness should select him [or her]." ' " (*Id*. at p. 237.) If "we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256.)

Having examined the photographic lineup in light of the foregoing principles, we conclude it was not unduly suggestive. Appellant did not stand out. The lineup contains the photographs of five other women of comparable age who appear to be of Caucasian or Hispanic descent, each photograph taken against a blue background. Their hair color and skin tone appears about the same. They are all wearing shirts of different colors, and none of them are wearing a pink shirt such as that described by Bueno and Torres. Appellant's hair is curlier than the others, but the fact there were some differences among the photos does not render the lineup unduly suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217 (*Johnson*).) Notably, both Bueno and Torres described the suspect to police as having hair that was partially one color and partially another, yet the photograph of appellant shows only brown hair. Moreover, Torres described the suspect's hair as "wavy" rather than "curly." Appellant's hair, as depicted in the lineup photograph, did not clearly identify her as the suspect.

Appellant's argument that the photos in the lineup should have been shown to the witnesses sequentially by someone who did not know the identification of the suspect affects the weight of the evidence, not its admissibility. We note that appellant was free to argue to the jury that the reason Torres and Bueno identified her was that she was the only one in the photographic lineup with such curly hair. Ultimately, this was a question of fact for the jury. But the court did not err in allowing the evidence.

B. *Sufficient Evidence of Attempted Vehicle Theft*

The jury was instructed with CALCRIM Nos. 400 and 401, which conveyed the general principles of aiding and abetting. Appellant argues the evidence was insufficient to support her conviction of an attempt to take or drive a vehicle without the owner's consent because she did not attempt to personally take Bueno's Dodge Durango from the

driveway and there is no evidence she aided and abetted Keith Warren's attempt to do so. We reject the claim.

"Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. [Citations.] Having viewed the entire record with the foregoing in mind, we conclude that substantial evidence supports the judgment, that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt." (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329–330 (*Mitchell*).)

An aider and abettor must "act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.] [¶] When the definition of the offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], the aider and abettor must share the specific intent of the perpetrator. . . . [A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [Citations.] The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he [or she] knowingly and intentionally aids and encourages." (*People* v. *Beeman* (1984) 35 Cal.3d 547, 560.)

Here, "[v]irtually, all of the probative factors relative to aiding and abetting are present—presence at the scene of the crime, companionship and conduct before and after the offense, including flight." (*Mitchell*, *supra*, 183 Cal.App.3d at p. 330.) The evidence, viewed in the light most favorable to the judgment, reasonably would support a finding that appellant, Warren and possibly a third woman hatched a plan to burglarize Bueno's home and steal her belongings, including the Dodge Durango parked in the driveway. The jury could infer from Torres's testimony that the group began "casing" the property about half an hour before, and that appellant then entered Bueno's home and was stealing property inside as Warren stood as lookout and attempted to take the vehicle parked just outside. That appellant was not personally seen inside the Durango does not

matter when the jury could reasonably find they were engaging in a criminal enterprise together.

C. *CALCRIM NO. 315*

In a supplemental opening brief, appellant contends the trial court committed reversible error by instructing pursuant to CALCRIM No. 315 that a witness's level of certainty is a factor to consider in evaluating the accuracy of identification testimony. Appellant argues that this portion of the instruction is contrary to empirical studies that show witness certainty has no correlation with accuracy and is legally incorrect. This precise issue is currently pending before the California Supreme Court in *People v. Lemcke*, review granted October 10, 2018, S250108 (*Lemcke*).

CALCRIM No. 315 directs the jury in evaluating eyewitness identification testimony to consider a number of questions, including, "How certain was the witness when he or she made an identification?" The Attorney General contends appellant forfeited any challenge to the instruction by failing to object. At the time of trial in this case, the California Supreme Court had upheld the inclusion of the certainty factor in CALJIC No. 2.92, the predecessor to CALCRIM No. 315, on more than one occasion. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461–463 (*Sánchez*); *Johnson*, *supra*, 3 Cal.4th at pp. 1231–1232; *People v. Wright* (1988) 45 Cal.3d 1126, 1144 (*Wright*) [upholding CALJIC No. 2.92 in its entirety, including the certainty factor].) Given this precedent, we reject the forfeiture argument because any objection to the certainty factor in CALCRIM No. 315 would have been futile. (See *People v. Penunuri* (2018) 5 Cal.5th 126, 166; *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections"].) This conclusion makes it unnecessary to address appellant's alternative claim that her trial attorney rendered ineffective assistance of counsel in failing to object to the certainty factor in CALCRIM No. 315.

The same precedent mandates that we reject appellant's claim on its merits. In approving the use of certainty as a factor in evaluating eyewitness identifications, our Supreme Court has recently explained: "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of

them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. [Citation.] In [*Wright, supra*, 45 Cal.3d at p. 1141,] we held 'that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved CALJIC No. 2.92, including its certainty factor. (*Wright*, at pp. 1144, 1166 [appendix].) We have since reiterated the propriety of including this factor." (*Sánchez, supra*, 63 Cal.4th at p. 462.)

Our Supreme Court is now considering whether the certainty factor as articulated in CALCRIM No. 315 is still valid. *Sánchez*, however, remains good law. Unless and until the Supreme Court changes that law, we are bound by its holding that including the certainty factor in instructions on eyewitness identification is not error. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

With respect to the issue of fundamental fairness, we note that the challenged instruction did not equate the certainty of a witness's identification with its accuracy. We also note that the defense identification expert testified, consistent with the instruction, that "a high level of confidence" was one of the factors that made for a good identification. In light of this, and given that a witness's certainty was only one among many factors that the jury was told to consider in evaluating an eyewitness identification, appellant was not prejudiced by the instruction under any standard.

D. *Imposition of Fine Without Determination of Ability to Pay*

Appellant was ordered to pay direct victim restitution to Bueno in a stipulated amount of $9,390 (which is not challenged here), a $300 restitution fine (Pen. Code, 1202.4), a $30 criminal conviction assessment fee (Govt. Code, § 70373) and a $40 court operations assessment (Pen. Code, § 1465.8). The court noted that these fines and assessments were mandatory, and declined to impose any discretionary amounts, finding appellant lacked an ability to pay them. Appellant argues the court erred by imposing the

"mandatory" fines and fees despite her inability to pay, in violation of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We reject the claim.

1. Background

Penal Code section 1204.2, subdivision (b)(1) provides for a restitution fine in the minimum amount of $300, up to a maximum amount of $10,000, when the defendant is convicted of a felony, and in the minimum amount of $150, up to a maximum amount of $1,000, when the defendant is convicted of a misdemeanor. Section 1202.4, subdivision (c) specifies, "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine. . . ." Thus, the statute requires the court to impose the statutory minimum regardless of the defendant's ability to pay, but it may consider ability to pay in setting a fine in excess of the statutory minimum. (*People v. Kramis* (2012) 209 Cal.App.4th 346, 350; *In re Enrique Z.* (1994) 30 Cal.App.4th 464, 468–470.) The criminal conviction and court operations assessments are mandatory. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272.)

The rule that a minimum restitution fine is mandatory regardless of ability to pay was analyzed in *Dueñas*. There, the defendant was indigent, homeless, a mother of two young children, afflicted with cerebral palsy, and barely surviving on public assistance. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160–1161.) Her driver's license had been suspended because she was unable to pay three juvenile citations, and she subsequently suffered a series of misdemeanor convictions for driving with a suspended license. (*Id.* at p. 1161.) In each case, she "was offered the ostensible choice of paying a fine or serving jail time in lieu of payment," but each time she was unable to pay and thus served time in jail. (*Ibid.*) When she suffered another misdemeanor conviction for driving with a suspended license, she asserted that she was homeless and receiving public assistance and asked the trial court to set a hearing to determine her ability to pay. (*Id.* at p. 1162.) The

trial court struck some fees, but imposed a restitution fine, a court facilities assessment and a court operations assessment totaling $220, ruling that they were mandatory. (*Id.* at p. 1162.)

On appeal, the court concluded that although a restitution fine imposed under Penal Code section 1202.4 was considered additional punishment for defendant's crime, that fine posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum amount authorized by the statute. (*Dueñas*, 30 Cal.App.5th at pp. 1170–1171.) To avoid the constitutional problem, the court held that Penal Code section 1202.4 requires a trial court to impose a minimum fine regardless of ability to pay, but that execution of the fine must be stayed until the defendant's ability to pay is determined. (*Dueñas*, supra, at p. 1172.) The *Dueñas* court also found it was a violation of constitutional due process to impose the court assessments required by Penal Code section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that the defendant has the ability to pay them. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.)

Some cases have criticized the holding in *Dueñas*, finding no constitutional impediment to imposing a minimum restitution fine as punishment without a determination of ability to pay. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 326–329 (*Hicks*); *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067–1068 (*Aviles*); *People v. Caceres* (2019) 39 Cal.App.5th 917, 928–929 (*Caceres*)

2. Forfeiture

Turning first to the lack of any objection by appellant, we are unpersuaded that appellant forfeited any challenge under *Dueñas*. We are well aware that as a general rule, a criminal defendant's failure to object to financial obligations imposed at sentencing forfeits the issue. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Nevertheless, "[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237–238.) At the time of sentencing, *Dueñas* had not yet been decided and

the trial court was statutorily compelled to impose the minimum restitution fine and the statutory assessments. An objection on the ground now asserted would have been futile.

3. Merits

As for the merits, we believe the courts in *Hicks*, *Aviles* and *Caceres* were correct in finding that *Dueñas*, although possibly correct on its facts, was incorrect to the extent it stated a broader rule that an ability-to-pay hearing was required before fines could be imposed as a matter of due process. (*Hicks*, *supra*, 40 Cal.App.5th at pp. 326–329; *Aviles*, *supra*, 39 Cal.App.5th 1055, at pp. 1067–1068; *Caceres*, *supra*, 39 Cal.App.5th at pp. 928–929.) We do not reiterate the thoughtful analyses in those cases; suffice it to say that the failure to hold a hearing on ability to pay (or the imposition of a minimum fine despite inability to pay) does not impair defendants' access to the courts or subject them to imprisonment as a consequence, as was the case in the two strands of cases on which *Dueñas* relied. Whether it is wise for the Legislature to require imposition of a minimum fine or nonpunitive fees and assessments is not before us. The question is: does it violate a defendant's right to due process? It does not.

4. Excessive Fine Clauses

Appellant alludes to the Excessive Fines Clause of the Eighth Amendment, but does not directly argue that it was violated in this case. (See also Cal. Const., art. 1, § 17.)[2] This argument was available to appellant at the time of sentencing yet was not made to the trial court. An objection on this ground has been forfeited. (See *People v. Baker* (2018) 20 Cal.App.5th 711, 720.)

III. DISPOSITION

The judgment is affirmed.

[2] Under the seminal case of *United States v. Bajakian* (1998) 524 U.S. 321, 334, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality" based on four considerations: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. (*Id.* at pp. 337–338.)

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

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